

**Letter of Findings: 04-20110371**  
**Sales Tax**  
**For the Period September 2010**

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**ISSUES**

**I. Sales Tax – Unanswered Claim for Refund and Subsequent ST-105.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5 et seq.; IC § 6-2.5-5-3; IC § 6-8.1-5-1; IC § 6-8.1-9-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dept. of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282 (Ind. Tax Ct. 1999); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629 (Ind. Tax Ct. 1999); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991) aff'd 599 N.E.2d 588 (Ind. 1992).

Retail Merchant protests the assessment of sales tax for a period for which it had self-credited a previously-filed but still pending claim for refund of sales tax.

**II. Tax Administration – Negligence Penalty.**

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Retail Merchant protests the imposition of the ten percent negligence penalty.

**STATEMENT OF FACTS**

Retail Merchant is an out-of-state entity that owns and operates vending machines in Indiana. On August 31, 2010, Retail Merchant filed claims for refund of sales tax with the Indiana Department of Revenue ("Department") for the periods November 30, 2008, through December 31, 2009. When Retail Merchant subsequently filed its September 2010 ST-105, Retail Merchant assumed a credit on the ST-105 for the amounts it had claimed for refund even though the Department had not taken any action on the claims at the time Retail Merchant filed its September 2010 ST-105. The Department consequently assessed Retail Merchant additional sales tax and penalty for that period. Retail Merchant protested the proposed assessment on the same grounds it was claiming refund of sales tax (Retail Merchant should refer to Final Order Denying Refund issued to Retail Merchant on August 3, 2011) that addresses the substance of the claim for refund of sales tax). A hearing was held on Retail Merchant's protest of the denied claims for refund of sales tax as well as the proposed assessment. Additional information will be provided as needed.

**I. Sales Tax – Unanswered Claim for Refund and Subsequent ST-105.**

**DISCUSSION**

When Retail Merchant filed its September 2010 sales tax return, it applied a credit to the return equal to the sales tax it had previously claimed for refund and which the Department had not yet either granted or denied; i.e., the claim was still pending at the Department. Because the Department had not at the time answered Retail Merchant's claim for refund, the Department essentially removed the credit and assessed Retail Merchant the resulting amount.

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax, known as the state sales tax, on retail transactions made within the state. IC § 6-2.5-2-1(a). A retail transaction occurs when, among other things, a retail merchant in the ordinary course of his regularly conducted trade or business acquires tangible personal property for the purpose of resale and transfers that property to another person for consideration. IC § 6-2.5-4-1(a),(b). IC § 6-2.5-5 et seq. provide exemptions for certain transactions involving tangible personal property.

On August 31, 2010, Retail Merchant filed claims for refund of sales tax for the periods November 30, 2008, through December 31, 2009. Before the Department answered Retail Merchant's claims, Retail Merchant essentially granted itself the claims and then credited itself the amounts on its September 2010 sales tax return. Subsequently, the Department denied the claims for refund of sales tax. Retail Merchant protested the denial of the claims. After hearing Retail Merchant's protest, the Department issued a final determination again denying Retail Merchant's claims for refund of sales tax (Retail Merchant should refer to Final Order Denying Refund issued to Retail Merchant on August 3, 2011).

Retail Merchant argued that it was entitled to self-credit on its September 2010 ST-105 what it deemed to be a prior over-payment of sales tax for all the same reasons it stated in its prior claims for refund of sales tax. Retail Merchant did not cite to any statutes, regulations, or case law in support of its argument.

First, the Department acted within the bounds of IC § 6-8.1-5-1(b), which states:

(b) If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

Second, by its very nature a claim for refund does not offer a guarantee that the claim will be granted. IC § 6-8.1-9-1 describes the process for claiming a refund and states in relevant part:

(a) If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department. Except as provided in subsections (f), (g), and (h), in order to obtain the refund, the person must file the claim with the department within three (3) years after the latter of the following:

(1) The due date of the return.

(2) The date of payment.

For purposes of this section, the due date for a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax is the end of the calendar year which contains the taxable period for which the return is filed. The claim must set forth the amount of the refund to which the person is entitled and the reasons that the person is entitled to the refund.

(b) After considering the claim and all evidence relevant to the claim, the department shall issue a decision on the claim, stating the part, if any, of the refund allowed and containing a statement of the reasons for any part of the refund that is denied. The department shall mail a copy of the decision to the person who filed the claim. If the person disagrees with a part of the decision, the person may file a protest and request a hearing with the department. The department shall mail a copy of the decision to the person who filed the protest. If the department allows the full amount of the refund claim, a warrant for the payment of the claim is sufficient notice of the decision.

(Emphasis added).

Third, since the claim for refund rested on a claim for exemption from sales tax, Retail Merchant should have known that the presumption of granting the exemption was premature because in applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). IC § 6-2.5-5-3(b), like all tax exemption provisions, is strictly construed against exemption from the tax. *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999). The taxpayer claiming exemption has the burden of showing the terms of the exemption statute are met. *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991) aff'd 599 N.E.2d 588 (Ind. 1992) (Internal citations omitted). Additionally "[e]xemption statutes are strictly construed because an exemption releases property from the obligation of bearing its fair share of the cost of government." *Id.*

For all the reasons above, Retail Merchant incorrectly credited itself sales tax on its September 2010 ST-105, and therefore the Department reasonably assessed Retail Merchant for those taxes.

#### FINDING

Retail Merchant's protest is respectfully denied.

#### II. Tax Administration – Negligence Penalty.

Retail Merchant protests the imposition of negligence penalty.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

(1) the nature of the tax involved;

(2) judicial precedents set by Indiana courts;

- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Retail Merchant has not affirmatively established that it had reasonable cause to credit itself the sales tax for which it was claiming a refund when the claim was still pending before the Department.

**FINDING**

Taxpayer's protest is respectfully denied.

*Posted: 10/26/2011 by Legislative Services Agency*

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